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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

Before The Honorable Thomas S. Hixson, Magistrate Judge

IN RE: APPLE IPHONE ANTITRUST )	
LITIGATION, )	NO. C 11-06714 YGR (TSH)
)	
DONALD R. CAMERON, et al., )	
)	
Plaintiffs, )	
)	
VS. )	NO. C 19-03074 YGR (TSH)
)	
APPLE, INC., )	
)	
Defendant. )	
)	
EPIC GAMES, INC., )	
)	
Plaintiff and )	
Counter-Defendant, )	
)	
VS. )	NO. C 20-05640 YGR (TSH)
)	
APPLE, INC., )	
)	
Defendant and )	
Counterclaimant. )	
)	

San Francisco, California  
Monday, January 25, 2021

TRANSCRIPT OF ZOOM WEBINAR PROCEEDINGS

(APPEARANCES CONTINUED ON NEXT PAGE)

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Official Reporter

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Monday - January 25, 2021

10:08 a.m.

P R O C E E D I N G S

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**THE CLERK:** Okay, everyone. Sorry for the delay.

We are here in Civil Action 11-6714, In Re: Apple iPhone Antitrust Litigation; and in 19-3074, Cameron, et al. versus Apple, Inc. and Epic Games, Inc. versus Apple, Inc., 20-5640, The Honorable Thomas S. Hixson presiding.

Counsel, please state your appearances. Let's start with Plaintiffs in the Apple Antitrust Litigation and then go down the line and then Apple -- Counsel for Apple can speak up after. So let's start with Apple Antitrust.

**MS. BYRD:** Good morning, Your Honor, Rachele Byrd, Wolf Haldenstein, on behalf of the Consumers.

**THE COURT:** Good morning.

**MR. LOPEZ:** Good morning, Your Honor, Rob Lopez of Hagens Berman for Developer Plaintiffs in the Cameron matter.

**THE COURT:** Good morning.

**MR. SIEGEL:** Good morning, Ben Siegel, also of Hagens Berman, for the Plaintiffs in the Cameron action.

**THE COURT:** Good morning.

**MS. MOSKOWITZ:** Good morning, Your Honor, Lauren Moskowitz from Cravath, Swaine & Moore on behalf of Epic Games.

**THE COURT:** Good morning.

**MR. SRINIVASAN:** Good morning, Your Honor, Jay

1 Srinivasan for Apple, Inc.

2 **THE COURT:** Good morning.

3 **MS. MAROULIS:** Good morning, Your Honor, Victoria  
4 Maroulis for non-party Samsung Electronics America.

5 I'm here with my colleague Kyle Batter, and we are both  
6 with Quinn Emanuel.

7 **THE COURT:** Good morning.

8 So we have got three joint discovery letter briefs here  
9 today. Let's start with Apple's subpoena to Samsung so we  
10 don't make Samsung sit through an Apex argument that it is not  
11 going to care much about.

12 I will give you my tentative thoughts and then ask Apple  
13 to respond.

14 I do think that this subpoena implicates confidential  
15 commercial materials within the meaning of Rule 45(d). So I  
16 think -- at least my tentative thought is that Apple needs to  
17 show a substantial need for these documents.

18 I understand that because you are only seeking documents  
19 that are not in the possession of Epic Games that, I guess,  
20 only Samsung is in possession of the documents that are the  
21 subject of this motion.

22 Here is the issue I'm struggling with: When I go back to  
23 Judge Gonzales Rogers' ruling on the motion for preliminary  
24 injunction, she emphasized a helpful point that these claims --  
25 and antitrust law more generally -- are not concerned about an

1 individual consumer or an individual producer such as Epic  
2 Games. They are interested in market aggregates.

3 And so it seems to me that the entire subject of RFP 5 is  
4 just one market participant. It happens to be the Plaintiff in  
5 action 20-5640, but Epic Games is just still one app producer.

6 And so I'm struggling with -- there could be some  
7 relevance, of course, to what is Epic Games' individual  
8 situation; but it seems like Apple is trying to use these  
9 documents to show relevant markets or the existence of  
10 competition.

11 And I'm just struggling with how information about one  
12 participant in the market could -- there could be a substantial  
13 need for that information.

14 So why don't you start with that.

15 **MR. SRINIVASAN:** Sure. And, Your Honor, we aren't  
16 just seeking the material, first of all, from one participant.  
17 We have, in fact, subpoenaed others. But let me back up a  
18 little bit.

19 We start with Judge Rogers' order where -- and I think we  
20 quoted some of the language to Your Honor -- but her order out  
21 of the preliminary injunction motion that said that this case  
22 is really about Epic's -- and she talked about Epic, and at  
23 times she talked about game developers more broadly; and at  
24 times she talked about app developers -- but at a minimum  
25 Epic's distribution options; that this case is the Epic case.

1 And as you know, Your Honor, we had an earlier subpoena  
2 for Samsung related to the class. This is an Epic focused  
3 subpoena because Judge Gonzales Rogers did say for the Epic  
4 case, the issues of the relevant market -- in particular the  
5 distribution options for Epic -- is implied and is something  
6 that the Court is interested in.

7 She had -- and I'm trying to find the order which I'm  
8 getting to -- but particularly, Your Honor, on page 18 of the  
9 order -- the order, this is page 18 of her preliminary  
10 injunction order, she says: "Epic Games' arguments  
11 distinguishing these other platforms as potential economic  
12 substitutes have not been sufficiently tested," which is why  
13 she couldn't make a ruling in the PI context and wanted to do  
14 it before trial.

15 Earlier on, on that same page, she writes, quote, The  
16 multi-platform nature of Fortnite suggests that these other  
17 platforms and their digital distributions may be economic  
18 substitutes that should be considered in any relevant market  
19 definition.

20 And we took that order and we have gone out -- the parties  
21 have gone out and subpoenaed Microsoft because of their Xbox.  
22 They have subpoenaed Sony because of the PlayStation 5. They  
23 have subpoenaed Nintendo and others so we can, in fact, see,  
24 the degree to which there is -- to test the measures of the  
25 relevant market, as Judge Gonzales asked us to do, to see how

1 broad it is.

2 We have a dispute. Epic does not believe, for instance,  
3 that Google Android should be part of the relevant market; that  
4 Epic's distribution of its product on that platform is not  
5 relevant to this case which -- with which we strongly disagree.

6 And so with that lone star in mind, we have issued these  
7 subpoenas, not just on Samsung but on a number of the key  
8 market participants. And for a second reason too, Your Honor;  
9 not just for the issue of relevant market and the breadth of  
10 that market but also to show that our conduct is an  
11 anticompetitive.

12 Miss -- Judge Gonzales Rogers was interested in that as  
13 well. And we are seeking information to show that these other  
14 platforms on which Epic distributes -- including Microsoft,  
15 Nintendo, Sony and others -- have essentially the same type of  
16 conduct and restrictions that Apple does.

17 They have a set of rules. They have a distribution  
18 platform that charges a commission. And they have rules that  
19 require the developers to pay -- to be charged in a certain way  
20 to use essentially the equivalent of Apple's function that  
21 requires Apple to take its 30 percent and proceed that way.

22 So there are two fundamental reasons why we need all of  
23 these platforms' information on these key issues. And, in  
24 fact, we think Judge Rogers' preliminary injunction order  
25 directs us to do that.

1 She said to the parties: Go and develop some facts on  
2 these fundamental issues. And, as I just quoted, she said that  
3 we need to test that. And that's what we are trying to do. We  
4 are trying to test it.

5 And I would also add that just on a -- I can be brief  
6 here -- there are other references in her order particularly to  
7 the Google Android system because another argument that Epic  
8 makes -- that they made in the preliminary injunction order  
9 context was that mobile systems are maybe different, and maybe  
10 we are not allowed to talk about the consoles because they are  
11 not mobile.

12 And that's a separate argument that they have raised, and  
13 they have said that mobile devices are separate.

14 And so, therefore, Samsung becomes even more important if  
15 the backup argument is going to be: Well, there are other  
16 distribution options for Epic but, you know, you can only look  
17 at the mobile ones.

18 Well, there is no greater mobile option than the Android  
19 system on which Samsung is based. And so we think that not  
20 only is this relevant, but we believe the Court has directed us  
21 to do this very inquiry, which is what we are doing. And, by  
22 the way, the other parties have been cooperating and producing.

23 **THE COURT:** Can you tell me a bit more about who all  
24 you subpoenaed? I think that would be helpful.

25 **MR. SRINIVASAN:** Absolutely, Your Honor. I don't know



1 that this would be an exhaustive list because I believe between  
2 the parties there is something like 20 or 30 third parties that  
3 have been subpoenaed.

4 We have subpoenaed Microsoft. We have subpoenaed Amazon.  
5 We have subpoenaed Sony; Nintendo; of course, Samsung; Google.  
6 We have subpoenaed Nvidia. They also distribute Fortnite  
7 through something called GeForce Now, so Nvidia is in there.

8 And then in addition to that, Your Honor, we have  
9 subpoenaed -- well, when I say "we," meaning either Apple or  
10 Epic; in many cases both -- a number of developers, game  
11 developers, base -- I shouldn't say developers -- game  
12 developers -- app developers: Basecamp, Spotify, Facebook, and  
13 the list goes on.

14 And then there is probably a half a dozen payment  
15 processors: PayPal, Stripe, Square. And, again, I'm giving  
16 you a non-exhaustive list. There is probably another 10 to 15  
17 that I didn't mention on top of this.

18 **THE COURT:** So I get the relevance of the platforms  
19 like Nintendo or Sony, and I get the relevance of the payment  
20 processors.

21 It is just for a particular app developer, that's where  
22 I'm struggling with. It seems like at most that is going to  
23 be -- you are going to pick out a handful of participants in  
24 the market and is this -- I'm worried that it might be kind of  
25 almost quirky, the type of discovery into the particular

1 developers.

2 **MR. SRINIVASAN:** Well, Your Honor, it's -- it is Epic  
3 focused; and much of this is Epic focused on both sides in  
4 terms of the subpoenas.

5 As you may remember, we did subpoena Samsung and Microsoft  
6 and Amazon and some other -- well, I don't know if it all got  
7 litigated before you; but there were a handful of folks that we  
8 had subpoenaed for the class cases before Epic filed its  
9 lawsuit and had asked broader questions.

10 And, in fact, we were here before you with Samsung and  
11 were working those out.

12 This is now -- you know, both parties' inquiries now have  
13 been very Epic focused.

14 **THE COURT:** Sorry to interrupt. But for these  
15 subpoenas that go out to other platforms -- like Microsoft or  
16 Nintendo or Sony -- are they about their platforms generally or  
17 are these subpoenas narrowly focused on Epic?

18 **MR. SRINIVASAN:** So again, with someone like Microsoft  
19 or Amazon, we had a subpoena that we had broadly -- that we had  
20 issued on broad issues before Epic was involved.

21 After Epic came in, we sent a separate subpoena to  
22 Microsoft and Amazon that is Epic focused. Sony and Nintendo  
23 is Epic focused. They were new. We didn't need to bother them  
24 before.

25 Our view is that this case the Plaintiff here in this

1 initial lawsuit is Epic. And ultimately the question here is:  
2 Was Epic foreclosed from distributing Fortnite by anything  
3 Apple did. And the only way we can --

4 **THE COURT:** I'm still struggling with that -- I don't  
5 think that is the question. I will have to go back and reread  
6 the order on the preliminary injunction.

7 The question is not where Epic could distribute its  
8 products but just in general what does the market look like.

9 **MR. SRINIVASAN:** Sorry, Your Honor, I didn't mean to  
10 interrupt. I think there is a dispute with the parties on  
11 that.

12 I think that Apple would say it is Epic, and we argued  
13 that to Judge Gonzales Rogers. There is an alternative that it  
14 might be game developers is another option which these  
15 subpoenas, by the way, would be equally applicable to in the  
16 sense of they would stand as a proxy for game developers.

17 And, you know, there is also a suggestion that even in the  
18 Epic case, it might be app developers. But that is certainly a  
19 hotly contested issue.

20 And what we -- our thought was we should be narrow in  
21 asking about Epic. We did not want to go back to these  
22 platforms and say: Give us everything you got about everybody  
23 you deal with, aggregate data.

24 That would actually be more burdensome to most of these  
25 platforms. From what we understood, they have actually been

1 gratified that we have focused on Epic and not asked for a  
2 broader inquiry, which arguably we could have asked for as  
3 well.

4 **THE COURT:** Okay.

5 **MR. SRINIVASAN:** Your Honor, just so I may, just so I  
6 can round this out, I mean, ultimately we are talking -- we  
7 need to show platform competition. And we can't do that  
8 without going to the platforms to show the degree to which, you  
9 know, games, apps, Epic -- however you want to slice it -- is  
10 distributed very vigorously on these other platforms and in  
11 many cases -- at least with respect to Fortnite -- much more so  
12 than they did on IOS.

13 So our choice was to either do a kitchen sink approach or,  
14 consistent with our view of the case, narrow it to Epic. And,  
15 again, I believe the third parties are happy that we have  
16 narrowed it rather than broadened it.

17 **THE COURT:** I'm sure that's true. But with respect to  
18 whether Epic can be used as a stand-in for app developers  
19 generally, that raises another question because it looks  
20 like -- at least according to the way RFP 5 is drafted in  
21 Apple's argument, it looks like Samsung and Epic worked out a  
22 deal between themselves. It looks like it might be sui  
23 generis.

24 **MR. SRINIVASAN:** And, again, Your Honor, from our  
25 perspective, this first lawsuit is Epic v. Apple. And there is

1 no question that our position is the market is -- should be  
2 narrowly drawn around Epic and Epic's ability to distribute on  
3 other platforms.

4 It is a contested issue. But that is certainly our  
5 position; that we did deal with Samsung more broadly to deal  
6 with the class cases, and we had a previous subpoena that we  
7 had some litigation on that you ruled on.

8 This is a second question that relates to Epic. And in  
9 particular Epic is complaining. Epic is an individual -- it is  
10 essentially an opt-out; wanted to bring its own lawsuit and  
11 it's complaining that it specifically was foreclosed.

12 And we do want to show that Epic specifically -- even to  
13 the extent that other -- your run-of-the-mill app developers do  
14 not have that option, Epic was able to make a specific  
15 arrangement with Samsung because they are a major player.

16 And we are entitled to know that because we are entitled  
17 to know how Epic is able to distribute elsewhere; that even  
18 regardless of Apple's conduct, Epic is able to get its product  
19 out; is able to cut deals with major market players.

20 And it is very Epic specific, Your Honor. I would argue  
21 you are absolutely right. The average app developer does not  
22 have that opportunity.

23 And if this was the class case -- I understand if  
24 Your Honor's ruling was: Wait a minute. This is about a class  
25 action of app developers. Why do you care about this one

1 person? They are an outlier, that may have some merit to it.

2 This is not a class case. This is about Epic. This is an  
3 individual plaintiff saying: You, Apple, foreclosed us from  
4 getting our product out there.

5 We are showing that they have plenty of other options, and  
6 they actually have some preferable options. I don't want to  
7 get into the details of that -- of their arrangement with  
8 Samsung. I'm being mindful of that.

9 But we are absolutely entitled to know that, and we are  
10 absolutely entitled to show that to Judge Gonzales Rogers in  
11 explaining why what Apple did, did not foreclose any market and  
12 that Apple alone is not a market for Epic.

13 **THE COURT:** But they are claiming -- this isn't a  
14 business tort claim. Epic is not saying: Apple, you torted  
15 us. They are saying you monopolized a market.

16 To prove that, it's not -- I mean, just whatever happened  
17 to Epic would never be sufficient to prove an antitrust claim.

18 **MR. SRINIVASAN:** Well, Your Honor, as you know, the  
19 definition of -- the market definition of what is a substitute  
20 is hotly litigated in virtually every antitrust case.

21 And they hold their Fortnite out as to be this unique,  
22 cross-platform, alternative universe that is not a substitute  
23 for any other game; that is a unique product of its own.

24 So at least we are entitled to make that argument; that  
25 the market is specific to Epic's ability to distribute its

1     Fortnite wherever. And that is our version of the market,  
2     which is their ability to distribute their product. And we  
3     believe that's a wide and expansive market.

4             And, again, maybe the fallback is we are talking just  
5     about game developers. We also would not agree at all that  
6     Epic in bringing an antitrust claim against Apple somehow  
7     represents all app developers.

8             And a way to illustrate that would be to say if you look  
9     at an app that is a calculator app, for instance, on your  
10    phone, that is not a substitute for Fortnite.

11            And so we know that at a minimum it is not going to be  
12    that expansive of a market. And the question is: How narrowly  
13    is it drawn? Is it just game developers or is it just Epic?

14            It is a contested issue. But, you know, as the Defendant  
15    in this case, we should be allowed to defend the position of  
16    the relevant market that we are advancing. And this is the way  
17    that we believe we need to do it.

18            And, again, in an ideal world, maybe we ask for all game  
19    developers' information from these third parties; but we  
20    thought that we would, you know, burden them less.

21            **THE COURT:** So Apple is taking the view -- at least  
22    with respect to the relevance of this discovery -- that the  
23    relevant market is either Fortnite or Epic?

24            **MR. SRINIVASAN:** Yeah. I mean, that is our view in  
25    the litigation. That is what we argued in the PI.

1 And Judge Gonzales Rogers indicated she didn't know enough  
2 yet. The facts were still contested. I believe -- the  
3 language I just read -- she said -- look, I don't have in front  
4 of me, so I can't quote it; but she -- actually, I have it.  
5 She said that this theory hasn't been sufficiently tested. So  
6 she needs more information.

7 And that's why we are having discovery. We need to be  
8 able to test our view that the relevant market is limited to  
9 Epic's distribution of the game Fortnite or, perhaps, a little  
10 bit broader than that; but that's our view. And we should be  
11 entitled to get discovery into that.

12 **THE COURT:** All right.

13 Let me hear from Samsung please.

14 **MS. MAROULIS:** Good morning, Your Honor, Victoria  
15 Maroulis for Samsung Electronics America.

16 In his answers to Your Honor, Counsel addressed the  
17 relevance or what Apple argues is the relevance of Request  
18 Number 5.

19 However, for a third party that is not the standard. As  
20 Your Honor both held in the October order of this Court and  
21 opened up today, the standard is really substantial need.

22 And just like last time, the Court found that Apple did  
23 not meet the substantial need standard to get highly  
24 confidential internal -- purely internal -- competitive  
25 documents of a third party.



1       The same is true here even though we only have one RFP  
2 before us and it is focused on Epic.

3       So the inquiry about substantial need is: Is Apple able  
4 to get the information it thinks is relevant somewhere else?

5       And if Your Honor looks at RFP 5 and its seven subparts,  
6 on the face of this RFP, it is pretty clear that everything  
7 Apple says it needs regarding Epic's ability to distribute the  
8 products and Epic's behavior in the marketplace and Epic's  
9 interactions from -- with any Samsung entity is something that  
10 they can get and have been getting from Epic.

11       It is our understanding that Epic has produced at least  
12 20,000 documents addressing its discussions with Samsung, its  
13 interactions with Samsung Korea and any governing agreements  
14 that govern the relationship. That can translate to anywhere  
15 from 30,000 pages to hundreds of thousands of pages.

16       The point here is that Apple has what it says it needs  
17 regarding what Epic does in the marketplace; how Epic interacts  
18 with Samsung; what Epic thinks about it; what Epic and Samsung  
19 Korea may be saying to each other.

20       The only thing Apple cannot get from Epic directly is  
21 internal, highly-confidential, strategic, competitive documents  
22 of Samsung Electronics America, to the extent they exist on  
23 this point.

24       And that is the same set of information that Your Honor  
25 already found not to be subject to production. Your Honor

1 quashed several requests last time in Apple's subpoena that  
2 sought purely internal, highly-confidential, competitive  
3 information.

4 Now, normally this information does not meet the  
5 substantial needs standard. It has also been found irrelevant  
6 in several cases. For example, in *Ebay* case there was a  
7 finding that a competitor's subjective thoughts about  
8 marketplace are not relevant to the definition of the market.

9 But respectfully, Your Honor, we don't need to go deeply  
10 into Apple's relevance arguments. Whatever they say the market  
11 is, whatever Epic says the market is, that fight is between the  
12 parties. That fight is not between Apple and non-party Samsung  
13 Electronics America.

14 The only questions before us here is: Is Apple entitled  
15 to a handful of highly-confidential competitive documents from  
16 a third party? And they have not demonstrated the substantial  
17 need, neither in their written papers that were submitted to  
18 Your Honor nor in Counsel's arguments.

19 What may be relevant is not sufficient. What Apple may  
20 like to have is not sufficient.

21 The only thing that would allow Apple any access to these  
22 documents is the solid proof demonstration of substantial need,  
23 and they cannot meet this need. And they have plenty of  
24 information from Epic, and we understand more is forth coming  
25 responsive to RFP 5.

1 Samsung Electronics America is a non-party. It's not even  
2 a non-party that has the agreement between Epic and another  
3 Samsung entity.

4 So this discovery is burdensome and inappropriate because  
5 it does not meet that very high standard, the substantial need.

6 **THE COURT:** All right. Thank you.

7 Let me then turn this back to Apple. As I understand your  
8 motion, you are asking for documents and information that Epic  
9 doesn't have. And if Epic is not even aware of something, if  
10 they don't know about something, why do you need it?

11 **MR. SRINIVASAN:** Yeah, and I will hit that right on,  
12 Your Honor.

13 I just did want to note one thing that I couldn't find  
14 before. It is on page 18 also of Judge Gonzales Rogers' order  
15 that -- there is a direct reference to Samsung Galaxy Store as  
16 being a relevant market player. I just wanted to mention that.

17 But as to your question about why we need it, we actually  
18 studied your order last time very carefully; and we took your  
19 position; that we are not interested and we are not allowed to  
20 obtain evidence about a party's subjective views on the market  
21 or its opinions. And that was in your order in the prior  
22 Samsung dispute, and we took that to heart.

23 We are not interested in Samsung's subjective views on  
24 anything. What we are interested in and we narrowly drew the  
25 subpoena to understand the facts of Samsung's experience

1 distributing Epic and Fortnite and other Epic apps on its  
2 Galaxy Store, which -- again, I don't want to get into  
3 highly-confidential information -- but there are aspects of  
4 that relationship and that distribution arrangement that are  
5 unique and are very interesting in our view. And, you know, we  
6 can go into a closed session. I'm happy to elaborate on that.  
7 However --

8 **THE COURT:** We don't need to. I'm willing to take at  
9 face value that there is probably something unique here. And I  
10 don't need to get all the details to know there is probably  
11 something relevant here.

12 My question is more if Epic doesn't know about something,  
13 then what is that all about?

14 **MR. SRINIVASAN:** It is not so much what Epic knows and  
15 what Apple knows, Your Honor. It is Samsung's experience  
16 distributing Epic on its platform -- on its Galaxy Store. How  
17 successful have they been?

18 What -- tweaking the relationship, how has that changed  
19 their ability to distribute more or less of Epic?

20 How has the fact that Apple and Google Play have now  
21 discontinued or you disabled Epic -- Fortnite in particular --  
22 from their distribution, has that caused more people to go to  
23 Epic -- excuse me -- Samsung on the Galaxy Store?

24 **THE COURT:** Would Epic know that though?

25 **MR. SRINIVASAN:** I don't know that they would,

1 Your Honor; and I don't know that Samsung would share all of  
2 its own experience of the benefits of the positions they have  
3 taken. I don't know that they would tell their partner all of  
4 that.

5 There is another very important piece of this, Your Honor,  
6 which Epic would not know necessarily at all, which is  
7 Samsung's own rules and regulations around how Epic is allowed  
8 to distribute on their platform.

9 Epic has contended that what Apple is doing -- excuse me,  
10 Your Honor -- that what Apple is doing with respect to  
11 limiting -- limiting the ability that they can't have their own  
12 app store within an app store -- sorry, Your Honor -- that they  
13 can't have their own app store within an app store; that the  
14 commission that Apple charges is improper; that they have to do  
15 the payment processing through Apple is improper.

16 These are all things that, you know, we would like to  
17 explore. And, again, I'm trying to skirt as much as I can  
18 here. That Epic faces the exact same restrictions or very  
19 similar restrictions on other platforms and to the extent that  
20 they are contending that when Apple is doing it, it is  
21 anticompetitive. The fact that everybody else is doing it, you  
22 know, is relevant to us defending that argument.

23 And Epic -- excuse me -- Samsung has those discussions  
24 internally. We -- you know, they may say: We do this for X  
25 reason. We do this for Y reason. We restrict our folks in the

1 same way.

2 They are not necessarily going to share that with Epic,  
3 but they certainly may be talking about the virtues of what  
4 they are doing which absolutely is internal. We can't get it  
5 anywhere else, and it is vital for us defending Apple's conduct  
6 particularly when other platform vendors are doing the same  
7 thing.

8 And that is not something they are going to share with  
9 Epic necessarily and very unlikely that they would explain the  
10 reasons for why they set up the rules the way they do. And,  
11 again, we contend it is very similar to what Apple does.

12 We can't get that from Epic. We are seeking the same  
13 information from other platforms. And, again, we need it to  
14 defend against our business justifications or pro-competitive  
15 reasons for why we do what we do and ultimately to defend  
16 Apple's conduct on this point.

17 **THE COURT:** All right.

18 **MS. MAROULIS:** Your Honor, may I address briefly?

19 **THE COURT:** Sure, please.

20 **MS. MAROULIS:** It appears what Apple seeks is not  
21 facts about the relationship between Epic and Samsung  
22 Electronics America but how Samsung Electronics America feels  
23 about the relationship.

24 Respectfully, that is not relevant to either definition of  
25 the market or any other part of the case.

1 Counsel tends to conflate Samsung Korea, that has the  
2 relevant agreement, with Samsung Electronics America; and that  
3 is an important distinction.

4 Regardless, Your Honor, has before you several documents  
5 filed under seal in this case. And Exhibit 5 to the joint  
6 letter shows the agreement and shows the different duties and  
7 responsibilities of the parties and shows the arrangement.

8 That is what Apple appears to say they need. They need to  
9 understand how the arrangement is. What are the  
10 particularities of the arrangement, what responsibilities each  
11 party has.

12 Plainly, it is in these documents and other Samsung to  
13 Epic and Epic to Samsung documents that Epic is already  
14 producing.

15 There is nothing that Apple can learn from unique, very  
16 highly-confidential Samsung Electronics America documents  
17 because they are not relevant to the actual facts of the  
18 parties' behavior but subjective opinions about them.

19 And further, Your Honor -- I hesitate to walk the Court  
20 through all seven subparts of RFP 5 -- but if the Court looks  
21 at it at some later point, most of them don't address what  
22 Counsel talked at length right now.

23 They talk about specific interactions between Epic and  
24 Samsung Electronics America and these specific interactions,  
25 whether it is technical support, co-marketing efforts,

1 campaigns and initiatives.

2 All of that would already be in the documents produced and  
3 being produced to Epic because they involved, by definition,  
4 both parties. It is co-marketing, joint initiatives, support  
5 given by Samsung to Epic and so forth.

6 **THE COURT:** Okay. Thank you. Just taking a note  
7 here.

8 (Pause in proceedings.)

9 **THE COURT:** I will give Epic an opportunity to speak  
10 if you want to. You don't need to. This is a dispute between  
11 Apple and Samsung, but everybody is talking about you.

12 So as long as you are here, if there is anything you want  
13 to say, go ahead.

14 **MS. MOSKOWITZ:** Thank you, Your Honor.

15 I think with respect to the dispute narrow, other than to  
16 say, obviously we have a much different view of what the  
17 relevant markets are here. And so certainly to the extent the  
18 Court has any questions, I am happy to address that.

19 Samsung's Counsel is clearly correct. We ran search  
20 terms. We are producing a lot of documents about the  
21 relationship, so that to the extent there is any question about  
22 that, Apple is getting a number of documents from us about  
23 Samsung.

24 **THE COURT:** Okay. All right. Thank you. Well, thank  
25 you, Counsel. I have what I need, and I will take it under



1 submission.

2 **MR. SRINIVASAN:** Thank you, Your Honor.

3 **MS. MAROULIS:** Thank you, Your Honor. May we sign  
4 off?

5 **THE COURT:** Yep, we are all set. We don't need  
6 Samsung any further at this hearing.

7 **MS. MAROULIS:** Thank you, Your Honor, and the court  
8 staff.

9 **THE CLERK:** Thank you, everyone. We are off the  
10 record. Court is in recess.

11 **THE COURT:** Well, we are continuing with the --

12 **THE CLERK:** Okay. Hold on, Judge.

13 (Pause in the proceedings.)

14 **THE CLERK:** I thought you were done completely. Go  
15 ahead. It is still recording.

16 **THE COURT:** No such luck. We are still continuing.

17 (Discussion held off the record.)

18 **THE COURT:** So now we have the Apex issues.

19 And with respect to Mr. Cook's deposition, the dispute has  
20 become narrowed by the parties' offers to compromise. It is  
21 somewhere between four hours and eight hours, and there isn't a  
22 principle of law that is going to answer that question. It is  
23 more just a practical inquiry.

24 I guess my tentative ruling is that -- this isn't a  
25 traditional Apex inquiry where the case is about some

1 historical decision, and we are trying to figure out who made  
2 it or how involved they were.

3 This is more detailed about -- in large part about the  
4 relationships between different types of markets and how much  
5 competition and some market's constraints competition in other  
6 markets, and it looks like it implicates an Apple business  
7 model or at least large parts of Apple's business model. And I  
8 would think that we would want to hear from the CEO about these  
9 different issues.

10 So my thought is that 7 hours of record time, that would  
11 be an appropriate length for his deposition; but I guess I will  
12 have Apple respond to that.

13 **MR. SRINIVASAN:** Thank you, Your Honor.

14 So on Mr. Cook, Your Honor, we think that this case, while  
15 it does implicate Apple's business model, many cases that are  
16 brought against Apple implicate the company broadly.

17 When, you know, the way we have these cases about Apple's  
18 battery or we have the case about some other aspect of Apple,  
19 Apple's iTunes music or some other important part of Apple's  
20 echo system, which are many.

21 So we think there is a dangerous precedent when on the  
22 theory that this implicates Apple's business model, its CEO is  
23 subject to a 7-hour deposition.

24 This is a massive company with lots of litigation; and it  
25 creates, we believe, a very bad precedent if that's all it

1 takes for somebody to say: We get Tim Cook for 7 hours.

2 I note parenthetically there is a related case, *Pistachio*,  
3 that is related to Apple Arcade, another part of the app store.  
4 Those plaintiffs have put Mr. Cook now on their initial  
5 disclosures list. And undoubtedly they will say: We need  
6 Mr. Cook for 7 hours.

7 And so we think that the Court really should, particularly  
8 with somebody like Mr. Cook, who is really about, you know, as  
9 Apex as it gets, that we should rigorously apply that standard.

10 And the real standard there is unique knowledge. Not does  
11 Mr. Cook know about Apple's business model; not only that maybe  
12 he has the largest voice in that business model, but whether on  
13 the specific issue here of the app store, whether he has  
14 anything unique to provide.

15 And what we are saying is Mr. Schiller, who is, you know,  
16 among the closest inner circle of Apple's top executives -- we  
17 are not talking about somebody at a low level. This is  
18 somebody who is mentioned in the same name often with Mr. Cook  
19 and Mr. Jobs before that, who we are providing, who is the  
20 person who leads the specific part of the Apple ecosystem that  
21 is the focus of this lawsuit, and that is the app store.

22 They are going to get Mr. Schiller for a long time. They  
23 are getting a number of other high-level executives. And  
24 I guess this gets into Mr. -- you know, whether Mr. Federighi  
25 and Mr. Cook are going to be ordered because if that's also the

1 case, then there are further people.

2 You have the CTO. You have another high-level executive  
3 in Mr. Cue. The real question starts to become: What does  
4 Mr. Cook offer that is unique?

5 And if you look at their brief, Your Honor, really the  
6 only thing they say that is unique about him is that he gave  
7 some testimony to Congress as the CEO, which, of course,  
8 happens all the time with companies.

9 And that is not a basis to bring somebody in for an Apex  
10 deposition because, in fact, the fact that he gave testimony  
11 publicly actually gives you what you need from him on what he  
12 knows, which was a very high-level summary of what Apple does  
13 with the app store that is basically mostly public anyway.

14 He didn't provide any insights, the thinking behind  
15 policy. Those are people like Mr. Schiller.

16 And so we are worried, Your Honor, that the thin thread on  
17 which they are bringing in Mr. Cook just because they have a  
18 very grandiose set of claims is a concern.

19 And we, by the way, thought a very appropriate balance is  
20 four hours. Four hours is plenty of time to ask him about his  
21 Congressional testimony.

22 The other thing they cited is that he gets customer  
23 complaints and developer complaints. And they gave you  
24 examples which I'm glad they did. It illustrates what happens.

25 Like a lot of companies, he receives them. He reads them

1 and he passes them on. He doesn't get into resolving them. He  
2 passes them on to people like Mr. Schiller, if you saw in those  
3 documents, who actually take the action to decide what to do  
4 and who are the original architects of this.

5 So we didn't want to take an unreasonable position and  
6 say: We are not giving you Mr. Cook at all. We do understand  
7 it is a significant case on some level. So the compromise we  
8 reached is four hours, which, Your Honor -- as you know with  
9 depositions -- is essentially a day for him. It is taking him  
10 out of commission for a day which is already a significant  
11 amount of time.

12 Seven hours on the record extends to ten hours of the day,  
13 potentially; much longer prep. It is a much bigger imposition.  
14 We thought we took a reasonable approach in giving them some  
15 time with him, which we think is ample.

16 By the way, they don't say in their brief that four hours  
17 is not enough time to cover the things that they note. And I  
18 won't go through the other things they note.

19 They talk about switches costs, which, again, is a generic  
20 subject. There is no reason to believe that Mr. Cook has any  
21 unique knowledge about switching costs. There are any number  
22 of people at the company that deal with that that they could  
23 depose about that.

24 Lastly they say: He must know about the competitive  
25 landscape. He is the CEO of Apple. Of course, that is true of

1 any CEO. They know about their business. It is not standard.  
2 It is unique, first-hand relevance.

3 And I would note in the *Corellian* case we cited in the  
4 context of the Cue and Federighi dispute, Mr. Federighi of  
5 Apple was at a time ordered to sit for a deposition of four  
6 hours; but it was only after he had been involved in meetings  
7 that he was in that were part of the case and submitted a  
8 declaration.

9 We don't have that here for Mr. Cook or, frankly, for  
10 Mr. Federighi or Cue. As a result, Your Honor, we are very  
11 concerned about an order that puts Mr. Cook up for a deposition  
12 in any case that alleges that Apple's business model is at  
13 stake.

14 We think the app store is at stake, and we have the person  
15 for the app store available for them to depose.

16 **THE COURT:** All right. Thank you. Let me hear from  
17 the Plaintiffs.

18 **MS. MOSKOWITZ:** Thank you, Your Honor.

19 And I do note you said "Plaintiffs." It is not just Epic.  
20 I will take the lead. There are three cases here, not just  
21 Epic. Of course, that means that those four generous hours  
22 would be split three ways.

23 But one other thing I think is very interesting is: I  
24 just heard Apple's Counsel say how this entire case -- I guess,  
25 Epic's case but maybe he referred to all three -- is only about

1 the app store.

2 We just got done hearing how it has nothing to do with  
3 Apple. It is all about competition across all platforms and  
4 all markets. It is about Android. It is about what switching  
5 costs there will be and how Epic, if it is just about Fortnite,  
6 how Fortnite is distributed on all those other platforms. It  
7 is not just about the app store.

8 In fact, that is why in particular we do need Mr. Cook and  
9 we do need Mr. Federighi because they are not simply app store  
10 people. They are implicating the highest strategic level  
11 decision making on how to structure Apple's business model,  
12 what changes to make, what decisions to make. It is not just  
13 about Mr. Schiller.

14 I get that Apple -- that he is their favorite witness. He  
15 is going to be their 30(b)(6) witness. He is going to be our  
16 trial witness. We get to depose people who we think have  
17 relevant information, and that's not just unique.

18 We don't have to prove that Mr. Cook will not say anything  
19 that overlaps with anyone else, but Mr. Cook has spoken  
20 publicly about switching costs. He has knowledge of switching  
21 costs. He has knowledge of why the model commission structure  
22 was selected and why it is maintained.

23 I really don't want to dwell on this too much, Your Honor,  
24 other than to say: We actually -- Apple offered six tethered  
25 to a whole bunch of other agreements. We couldn't agree. We

1 narrowed down to (inaudible).

2 Your Honor, 7 hours, we will make due with. At least I'm  
3 speaking on behalf of Epic. If that's where we are ending up,  
4 I don't think you need to hear anything else from me on this.  
5 Four hours is just not enough. We have to divide this up. We  
6 understand he is a busy man.

7 This is not a harassment case, like all the cases Apple  
8 cites. That is not what we are doing here. We are trying to  
9 depose the people with the relevant, critical knowledge at the  
10 key areas of this company that are implicated in these three  
11 cases; and we are going to do it together when we are  
12 coordinating. We will do so in 7 hours for Mr. Cook.

13 **THE COURT:** Do the class Plaintiffs want to weigh in?  
14 If you divided up oral argument among yourselves, then you  
15 don't have to. I just wanted to give you the opportunity.

16 **MR. LOPEZ:** Just very little to say. In addition,  
17 Your Honor, I request Plaintiffs, also the developers, could  
18 live with 7 hours; and we would do our best, obviously, to  
19 split as efficiently as possible with Epic and with the  
20 consumers.

21 Again, we just want to underscore what Ms. Moskowitz said.  
22 These are three separate major cases. In and of themselves,  
23 each would be a major case.

24 And, again, you know, 4 hours is simply too little. I  
25 think the Court's landing on 7 hours is something that is fair



1 to all concerned.

2 So this isn't just a run-of-the-mill case. I don't know  
3 about this *Pistachio* case. Again, that seems to be centered  
4 just on one aspect of Apple's business. So I don't know that  
5 that is a very good concern for Mr. Srinivasan to be raising  
6 here.

7 And, again, in addition to the cases that are pending, of  
8 course, there has been a major Congressional investigation here  
9 that Mr. Cook provided testimony to, including live testimony.  
10 And those issues are obviously very important, not only to  
11 these cases but to the country at large, which is grappling  
12 with the power of these large platforms.

13 So, again, I think probably the 7 hours, as the Court has  
14 indicated, is a good compromise. We wish that we could have  
15 more time. And we think we are entitled to 10 hours under the  
16 coordination order. But we understand the concerns that the  
17 Court has raised and that Apple has raised.

18 So I think with that, I will close.

19 **THE COURT:** All right. Ms. Byrd, anything the  
20 consumer Plaintiffs want to add?

21 **MS. BYRD:** On behalf of Consumers, we also believe  
22 that 7 hours is a good compromise; that we should be able to  
23 get what we need -- the questioning that we need to take within  
24 that time period.

25 And Apple's concerns about precedent should be alleviated

1 by noting that there are three very big and important cases  
2 that have been coordinated here.

3 **THE COURT:** All right.

4 **MR. SRINIVASAN:** Your Honor, if I may just briefly  
5 respond. I don't want -- just a few points.

6 One, you know, you heard Mr. Lopez say at the end that not  
7 only is Mr. Cook relevant to the cases here but that he could  
8 speak to important issues that are important to the country at  
9 large.

10 That is exactly our concern. This is not an opportunity  
11 for Plaintiffs to start asking him questions about issues that  
12 are important to the country at large. And that's exactly what  
13 we worry about; that they don't need Mr. Cook for more than 4  
14 hours.

15 In fact, you heard Ms. Moskowitz say that we were working  
16 on a deal to negotiate 6 hours. And we would just respectfully  
17 say, Your Honor, that the Plaintiffs said: If you give us more  
18 time with other people, you can -- maybe we can live with 6  
19 hours for Mr. Cook.

20 They know they don't need more than six hours with  
21 Mr. Cook. More than six hours with Mr. Cook will only lead to  
22 the type of mischief that we are concerned about; that  
23 Mr. Lopez sort of previewed. And that is exactly why we are  
24 very focused on this.

25 So at a minimum, Your Honor, if you are inclined to go

1 forward and give them more than four hours, we would  
2 respectfully suggest that it at least be limited to six, a  
3 number that the Plaintiffs were willing to at least negotiate  
4 at one point.

5 **THE COURT:** Well, that was the deal that didn't work  
6 out.

7 So if the parties make deals, then you get the benefit of  
8 those deals. If the deal doesn't come together, then it's all  
9 sort of left on the floor; and the Court is going to resolve  
10 the dispute. I think I have what I need for Cook's deposition.

11 Now, we come to Cue and Federighi, I guess, one question I  
12 have for Apple is: How many SVPs does Apple have?

13 **MR. SRINIVASAN:** Your Honor, I don't know the answer  
14 to that question. But if you look at the Apple leadership  
15 page, I think there is something like 16 people listed on the  
16 entire page for the company. That includes a bunch of people  
17 from foreign -- you know, that have foreign responsibilities.

18 So you already have Mr. Schiller and Mr. Cue -- I'm  
19 sorry -- Mr. Schiller and Mr. Cook now who are, of course, at  
20 the very tip of that Himalayan range of Apex witnesses. And  
21 both Cue and Federighi -- Mr. Cue and Federighi are also on  
22 that page.

23 So we are talking about folks who are the top 16 or so  
24 people in what is the biggest company in the world. And so  
25 these are truly Apex people, and Plaintiffs are also now

1 getting a full day with Mr. Cook, what -- in a typical case a  
2 7-hour deposition would be a full day with Mr. Cook and, of  
3 course, Mr. Schiller as well. So we think this is now getting  
4 fairly excessive.

5 **THE COURT:** Okay. All right. And let me hear from  
6 the Plaintiffs.

7 **MS. MOSKOWITZ:** Thank you, Your Honor.

8 I think Your Honor's remarks in the beginning apply  
9 equally to Mr. Cue and Mr. Federighi. This is not a case where  
10 we are just trying to get high-level executive depositions to  
11 talk about policies and procedures or the same thing you can  
12 get out of an interrogatory or a 30(b)(6).

13 We don't want the company line from these guys. We want  
14 to understand what is going on in the -- in the space in  
15 between the policies and procedures.

16 There are discretionary -- discretionary decisions that are  
17 happening about app store issues, about the developers, about  
18 exceptions, about policy changes and where the company is going  
19 to go in the future with respect to the app store for Mr. Cue.

20 Mr. Schiller is another one of those decision makers, but  
21 he is not the only one. Some decisions go to Mr. Cue. Some go  
22 to Mr. Schiller. Sometimes they disagree. Mr. Schiller is in  
23 the room where it happens in some meetings, and Mr. Cue is in  
24 the room when it happens in others.

25 And Mr. Cue is a central person -- regarding even Apple's

1 view of how narrow this case is supposed to be when it was  
2 making its argument just now about the app store -- Mr. Cue is  
3 one of the two people that Apple's own witnesses has said has  
4 veto power over decisions. He is consulted in deciding on  
5 critical issues of how to enforce or not enforce their stated  
6 policies and procedures, their stated guidelines.

7 So it is really -- it's not about harassment. This person  
8 is very relevant. He is -- Apple, themselves, put them on  
9 their initial disclosures. We are not pulling him out of thin  
10 air.

11 There were a lot of other people that we contemplated  
12 getting documents from and deposing. We have narrowed it down.  
13 Mr. Cue is highly relevant for all of the same reasons  
14 Mr. Schiller is. They don't get to pick which of the two they  
15 want us to talk to.

16 And certainly we have issues with Mr. Schiller's  
17 deposition and the timing of that, but I will want to raise --  
18 if Your Honor will be willing to hear us out after this -- but  
19 we are not -- we are not willing to just go with who Apple  
20 wants us to talk to on these key issues.

21 With respect to Mr. Federighi, it is a completely separate  
22 question. Mr. Federighi isn't at the app store level, and that  
23 is precisely why we want him.

24 Apple is making a lot of arguments. Their entire  
25 pro-competitive justification -- or at least a large part of

1 it -- is about security and why they have to have security.

2 Their position is that they want that at the app store  
3 level, and that's where it is happening. We don't think that's  
4 right. We don't buy the party line they are giving us in their  
5 interrogatory answers on that.

6 We want to talk to the person who is developing the tools,  
7 developing the security features at the operating system level  
8 so that we can actually test and poke the holes that we think  
9 are there on Apple's -- what we believe -- pretextual argument  
10 for why it is controlling the app store distribution.

11 So Mr. Federighi -- we have talked about this on the  
12 custodian stage -- he is clearly relevant to these issues, and  
13 we get to talk to him, in our view, about what his documents  
14 are and what these issues are.

15 No one else -- not Mr. Schiller and not Mr. Cook -- can  
16 talk about the technical and engineering aspects of security  
17 and the tools that Apple is providing, why they are developing  
18 them, how they invest in them, why they invest in them. And  
19 that is happening at Mr. Federighi's level, not just for IOS  
20 but also for Mac OS.

21 And Mac OS is another area that we are going to want to  
22 test in this case because it is Apple's own operating system  
23 that it has developed in a completely different way -- in an  
24 open way -- and whether and to what extent the security  
25 features can happen at an operating system level, we are going

1 to want to test that with Apple's own platform, Mac OS. And  
2 Mr. Federighi has absolute personal knowledge over that system,  
3 choices that are made and distinctions between Mac OS and IOS.

4 So we think he is absolutely fundamentally relevant, not  
5 substitutable, as is Mr. Cue. So we have tailored our request  
6 here.

7 We didn't ask for all 10 of those SVPs or however many --  
8 17 people -- are on Apple's web page. We went to the people we  
9 think we need. We asked for their documents. We got them.

10 Mr. Cue's documents were always part of this case. Apple  
11 always had him as a custodian. Without Mr. Federighi, we need  
12 to talk to them about the key issues, about issues that are  
13 fundamental to all three of our cases to implement the business  
14 model. Thank you.

15 **THE COURT:** Thank you. Do the class Plaintiffs want  
16 to add anything?

17 **MR. LOPEZ:** Yes, Your Honor, sorry about that. I  
18 couldn't get unmuted.

19 First of all, I'm not sure exactly what questions the  
20 Court is going to have. But to the extent the Court is  
21 interested in Apple's exhaustion argument, Apple makes a broad  
22 statement at page 8 of the letter brief that somehow all of us  
23 agreed to an expedited schedule. And, of course, that's not  
24 true with respect to the class Plaintiffs. So I wanted to  
25 point out that distinction as well.

1 Again, to underscore what Ms. Moskowitz said in one  
2 particular sense, the Plaintiffs, I think, had made a fulsome  
3 record here with regard to the particular issues we want to get  
4 into with these folks.

5 It is definitely not about any kind of stunt or anything  
6 beyond these cases. These are all grounded in the important  
7 issues that these issues raise specifically. And that's the  
8 same for Mr. Cook.

9 Frankly, again, when I raise Mr. Cook's testimony to  
10 Congress, I'm not talking about in some general sense. I mean,  
11 Mr. Cook specifically testified with regard to the commission  
12 rates and with regard to what he thinks and, therefore, what  
13 Apple thinks justifies those rates.

14 So these are all grounded in very specific issues that we  
15 think all the Plaintiffs should go into and must go into in  
16 their cases.

17 **THE COURT:** All right. Thank you. Ms. Byrd, anything  
18 further from the consumer Plaintiffs?

19 **MS. BYRD:** No, Your Honor. I don't have anything to  
20 add.

21 **THE COURT:** All right. Mr. Srinivasan, some reply  
22 from Apple.

23 **MR. SRINIVASAN:** Sure. Your Honor, in listening to  
24 Ms. Moskowitz's justification for Mr. Cue and Federighi, really  
25 strikes me as we are damned if we do and we are damned if we



1 don't. I mean, she wants it both ways.

2 On the one hand Mr. Cue is relevant and absolutely  
3 necessary and critical because he overlaps with so many other  
4 people including Mr. Schiller. He is central to the case,  
5 which is the app store; and, therefore, he absolutely must be  
6 deposed.

7 But when it comes to Mr. Federighi, it is suddenly: We  
8 need Mr. Federighi because he overlaps with nobody. He  
9 overlaps with not the central issue in this case; and,  
10 therefore, he has to, of course, be deposed.

11 And the issue really, I think, is sharpened when you think  
12 about it in the context of Mr. Federighi -- and I will come  
13 back to Mr. Cue -- but as there is no dispute, Mr. Federighi  
14 sits at the top of engineering -- software engineering for  
15 Apple. That is a large mountain that he sits at the top of.

16 There are many, many executives and, of course, other  
17 employees below him. We have offered one to them. We said:  
18 Mr. Neuenschwander is the person who can speak to these issues,  
19 who is not an Apex executive, who doesn't need to be bothered.

20 Now in the context of documents, Your Honor, you said to  
21 us -- and we agreed -- you ultimately said: Look, I know you  
22 would rather produce Neuenschwander's documents. They want  
23 Federighi. What does it matter? They are poking -- you know,  
24 they are going down the wrong hole.

25 Let them get Federighi's documents even though you offered

1 to give them a better custodian. That's on them. It doesn't  
2 matter. This is not Apex.

3 Well, now we are at Apex. And at Apex the rule is if we  
4 say there is somebody less burdensome that you should take on  
5 the very same issues that you want, they have to do that.

6 They haven't even tried. And, in fact, as Ms. Moskowitz  
7 says, there is a whole different operation that Mr. Federighi  
8 is in charge of. He is not the app store. And he is the Apex  
9 executive of that operation that is not the key piece of the --  
10 of the company that is at issue in this case.

11 How in the world do you get to go to the top executive  
12 first? And particularly where we say there is another  
13 executive?

14 Mr. Neuenschwander is a senior executive himself. He is  
15 not the top of the operation. We said take his deposition. If  
16 you want to talk about these issues, he can talk about those  
17 issues. They have 16 -- 15 other depositions they can take.

18 They didn't take a single person. They didn't ask for a  
19 single person. They insisted on the number one guy in the  
20 organization who leads a thousand person division, and that's  
21 the problem with Mr. Federighi. We can go into more details  
22 that we briefed.

23 Now with Mr. Cue, it is similar. With Mr. Cue, he is also  
24 at the top of a different organization now, Apple music and  
25 iTunes -- it is right there on the website -- and, actually, a

1 bunch of other things, Apple search ads and a number of other  
2 initiatives that Apple has.

3 What he is not in charge of is the app store. They have  
4 Mr. Schiller. I know we are a broken record on that. But they  
5 will get Mr. Schiller. They have asked and they have deposed  
6 and will be deposing the VP of the app store, VP of developer  
7 relations and a number of other people who are in the app store  
8 organization who will give Epic and the Plaintiffs as many  
9 different views on the app store as their hearts could desire.

10 It is not one person. We are not putting forward one  
11 Mr. Schiller who is going to be the spokesperson and give the  
12 party line. They have literally a dozen other people, almost  
13 all of whom are executives -- many of whom are high-level  
14 executives -- who they can ask these questions to.

15 Nothing they showed about Mr. Cue is unique to Mr. Cue.  
16 There is no aspect of any document, Your Honor, that they  
17 provided to you or any deposition testimony they provided to  
18 you. Nothing is unique to Mr. Cue.

19 At a minimum they should come back to you at some point  
20 after they have taken -- they have taken five. They still  
21 haven't been able to identify anything where somebody said:  
22 Mr. Cue is the only guy. They identified a few documents that  
23 said it would be Mr. Schiller or Mr. Cue or maybe Mr. Cook.  
24 Nothing that said this is just Mr. Cue.

25 And they can take some more depositions, and they are

1 going to find the same thing.

2 The fact is this isn't just sort of open season on Apple.  
3 There has to be some constraints. We are already doing 16  
4 depositions in this case of other high-level Apple executives.  
5 There has to be a limit to it.

6 They haven't shown you any discipline in saying very  
7 specifically why these two folks are needed. And in the case  
8 of Mr. Federighi, they have affirmatively spurned our offer to  
9 give them a less intrusive deposition on the very issues that  
10 they seek.

11 **THE COURT:** All right.

12 Are you still bound by the prior deadline you had to  
13 complete depositions in the Epic case?

14 **MR. SRINIVASAN:** We are, Your Honor. February 15th is  
15 the day that is the cut-off date.

16 We believe -- you know, it is an interesting case where I  
17 think in most antitrust cases, most complex cases, where you  
18 have a typical discovery period of, you know, nine months to a  
19 year.

20 Parties at the end say: Let's -- we have to let a few  
21 depositions go over. Whether they formally get an extension or  
22 not, it is something that is typically worked out. That has  
23 been our experience.

24 **THE COURT:** Okay.

25 **MR. SRINIVASAN:** In this case Epic is unwilling -- in

1 a compressed discovery schedule where we are trying to do all  
2 of this in just a few weeks, we think it is absolutely  
3 necessary to do that. Frankly, you know, we can get into those  
4 issues later, Your Honor. We don't think it is physically  
5 possible.

6 There are days we have ten depositions likely scheduled in  
7 this case with third parties on one day. So forget about  
8 triple tracking. It is ten. I don't know. Is it  
9 deci-tracking? I don't know if they ever counted that high.  
10 That's where we are.

11 We do believe that part of the way that this can be  
12 resolved is to extend that date a little bit through direct  
13 court order or through the parties cooperating to do so.

14 At least Epic -- I don't know where the class Plaintiffs  
15 are on this -- is absolutely unwilling to be flexible about  
16 this.

17 **THE COURT:** What I was leading up to is: I would like  
18 to take a couple of days to digest the oral argument before I  
19 get out my order. So probably on Wednesday or Thursday I would  
20 get it out. And I want to know would that cause a problem for  
21 the parties?

22 **MR. SRINIVASAN:** Your Honor, speaking for Apple, that  
23 is the least of the problems Apple has, would be your order  
24 coming out two or three days later.

25 We have, you know, dozens of unscheduled deposition or

1 depositions we are still trying to schedule; document  
2 productions on both sides that are slower than they were  
3 anticipated to be.

4 So we have a lot of problems, Your Honor, meeting that  
5 date; but I don't think your order coming out a few days later  
6 would be a problem for us.

7 **THE COURT:** Go ahead. Let me just ask the Plaintiffs  
8 your view. Would it be a problem if I took two or three days  
9 to get this order out?

10 **MS. MOSKOWITZ:** Your Honor, Lauren Moskowitz.

11 To address that specific question, no. But I have a lot  
12 of additional things to say if Your Honor would permit me.

13 **THE COURT:** I will. First, let me hear from the Class  
14 Plaintiffs. Is it okay if I wait two or three days to get this  
15 order out?

16 **MR. LOPEZ:** Yes, Your Honor.

17 **MS. BYRD:** That's fine.

18 **THE COURT:** Okay. Thank you. I wanted to think about  
19 it. I know you are under a tight deadline at least in the Epic  
20 case. I don't want to cause any problems.

21 Ms. Moskowitz, you have more on the agenda.

22 **MS. MOSKOWITZ:** Thank you, Your Honor.

23 Just a couple of points just in response to some of the  
24 things that Apple's Counsel just said.

25 We have been asking for depositions since before

1 Christmas, for the dates. Everyone has known our list. As  
2 Your Honor knows, we briefed our list.

3 It is 14 additional people besides Mr. Cue and  
4 Mr. Federighi. We have been asking for dates. Apple has been  
5 not giving us dates including some of the people who they say  
6 we should have deposed before pressing for Mr. Federighi.

7 We asked to depose them before we got here today. They  
8 refused to give us dates in that window. They pushed them. In  
9 fact, one of them we don't even have. And then they want us to  
10 depose someone who Your Honor specifically said is not the  
11 right custodian for us to have.

12 It is just -- it is an odd situation that Apple thinks it  
13 is a benefit to them; that they haven't allowed us to take any  
14 of these depositions as a way to stop us from taking  
15 Mr. Federighi's deposition. That is not the standard.

16 The other aspect of what Mr. Srinivasan said that is  
17 troubling is that they repeatedly complain about the schedule.  
18 They have complained to you multiple times. They have even  
19 complained to Judge Gonzales Rogers.

20 In a brief where they asked Judge Gonzales Rogers to move  
21 the schedule, the Judge said no. In fact, reaffirmed  
22 everything about our schedule.

23 We are headed towards a May 3rd trial. A lot of things  
24 are tethered off of that including the fact discovery deadline,  
25 which is not just February 15th for our fact discovery in Epic.

1 It is our deadline for opening expert reports. Nothing can  
2 slip. Everything is -- you pull that thread and the thing  
3 falls apart. We need to keep it.

4 And Apple is engaging in self-help by just dragging their  
5 feet and refusing to schedule depositions; give us answers to  
6 interrogatories; give us documents that they have been  
7 promising us and then saying we can't get it done. That is not  
8 one of their options. We have to comply with the Court's  
9 schedule.

10 So I do have a few issues that, Your Honor, we tried to  
11 brief with Apple. They refused to give us their portion of the  
12 joint statement. We gave ours over the weekend.

13 We need some relief from the Court as soon as Your Honor  
14 can hear us out. Some of which I actually don't think needs a  
15 joint statement. It is pretty simple.

16 For example, Apple has given us Mr. Schiller on  
17 February 15th for a two-day deposition starting at the close of  
18 fact discovery, the same day our expert reports are due. We  
19 immediately rejected that and said that can't happen.

20 They can't put their favorite witness -- who also, by the  
21 way, Your Honor, is going to be their 30(b)(6) witness for up  
22 to a dozen topics. They haven't told us which topics, but they  
23 have told us --

24 **THE COURT:** Let me preview something for you. I'm not  
25 going to rule on any -- I had a fair amount of briefing coming



1 into this hearing, and that's what I have been able to  
2 consider. So I'm not going to rule on the merits of a new  
3 dispute you raise.

4 What I'm willing to do is set a briefing schedule and a  
5 further hearing if you would like me to do that.

6 **MS. MOSKOWITZ:** Yes, Your Honor, thank you. I was  
7 just previewing the issues.

8 But, yes, I'm happy to do that. And Apple has had our  
9 joint statement portion for days. So we would ask Your Honor  
10 to order Apple to respond by this afternoon and for us to file  
11 the joint statement as soon as possible.

12 And if Your Honor would like a hearing on that, to  
13 schedule that as soon as you have availability. And I can --

14 **MR. SRINIVASAN:** Your Honor, can I be heard on that?

15 **THE COURT:** Yes, please.

16 **MR. SRINIVASAN:** This is actually a little bit  
17 outrageous. So you continued the hearing from Friday to today  
18 because you wanted to see some more documents, which made  
19 sense.

20 There was no briefing schedule. On Saturday morning at  
21 1:00 a.m., this past -- two days ago -- we received a brief  
22 from them to say: Brief this by tomorrow; okay.

23 Then we got another one on Sunday morning and said: Brief  
24 this by later today. That is what she is talking about, about  
25 the briefs that we have had for days.

1           So that's not the way we do things here. We have them.  
2           We haven't looked at them. We have other things to do. We are  
3           trying to comply with all the things they are asking us to do.  
4           We don't have time to needlessly brief.

5           We are happy to have a hearing on these issues, but we  
6           have to have a chance to do it in an orderly way.

7           Let me just step back. I do want to address the broader  
8           point. Ms. Moskowitz is right about one thing. That is, we  
9           have been a broken record about the schedule. We said to the  
10          Judge, Judge Gonzales Rogers, that we think we need more time  
11          to do this. She said no.

12          Epic said: We don't need more time. And I won't read you  
13          the quotes, but they said something like: We just want some  
14          targeted limited discovery on IAP, which is just a small piece  
15          of this case. That's what they said to her. And then she said  
16          based on that okay. Then we will give you Epic's abbreviated  
17          schedule.

18          Well, their idea of limited targeted discovery has been 86  
19          document requests, 9 more custodians; translates to 8 million  
20          documents more that Apple is reviewing. I don't believe that  
21          is the discovery that Judge Gonzales Rogers had in mind when  
22          she set the schedule.

23          Now, Epic then, for its part, has kept the pedal to the  
24          medal on that. They have doubled down. They said: We need  
25          nine new custodians. We said: You know what, we can't do that

1 by January 6. That's the deadline.

2 By the way, Ms. Moskowitz talks about the sacrosanct  
3 February 15th deadline. The deadline for document production  
4 was January 6th. We very openly said to them: You are asking  
5 us to review millions of documents. We cannot produce those by  
6 January 6th. We can tell you right now we can't.

7 They made a deal. They made a decision. They said: You  
8 know what, we would rather have those documents. Produce them  
9 later. We said: You know what, it is going to be mid to late  
10 January, maybe even bleeding into February.

11 That's what we told them from day one. They said: Fine,  
12 we will take it.

13 And then they turned around and say: We want 16  
14 depositions. And for every deponent, we want the documents 14  
15 days before that deposition.

16 Well, let's think about that. January 6th was the  
17 original for the original deadline that we said we couldn't  
18 meet. Then at a minimum they said: We don't want to take any  
19 depositions before January 20th.

20 So now we are talking about taking 16 depositions of  
21 theirs; 14 depositions of ours. They want dozens of  
22 third-party depositions, all between basically January 20th and  
23 February 15th.

24 We have been trying to be adults about it. We have said:  
25 Look, one of two things has to happen. Either your outsized

1 appetite for depositions and documents has to be renegotiated  
2 or downsized or we need more time in the schedule. We  
3 physically can't do both.

4 In every other case I have been in, that is something the  
5 parties do. In this case -- where we need it more than any  
6 other case given this compressed discovery -- it is not  
7 happening.

8 Instead, they are going to come in and they are going to  
9 insist that Apple produce millions of documents ahead of when  
10 we said we would, so they can cram in dozens of depositions of  
11 people they don't even need.

12 And that's the situation. We can brief it. I don't know  
13 how the Court is going to resolve it. Our own view is the  
14 parties need to sit down and be adults and work this out.

15 But if they want to say: We want all this to happen. We  
16 are not going to be flexible on what we want to happen, and we  
17 are not going to be flexible on the date. I don't even know  
18 how Your Honor is going to resolve that.

19 But, you know, we should have a briefing schedule on it;  
20 and we can come and deal with it then. But I would urge  
21 Counsel here -- you know, everybody on this Zoom -- we need to  
22 work on this. We need to figure out something because I don't  
23 think, Your Honor, that you can order things to happen that  
24 aren't physically possible.

25 **THE COURT:** Well, we will see.

(Laughter)

**THE COURT:** So here is the deal. Judge Gonzales Rogers sets the case schedule, and then I manage discovery within the boundaries that she sets. So that's all I can really do.

So I hear the two sides' points of view on whether the deadline should be extended. I'm happy to listen to whatever you have to say. There is simply nothing I can do about that. All I'm going to do is manage whatever is the appropriate amount of discovery to take place by the deadline.

So I do think that with respect to party depositions, the parties should work that out because I'm going to order those depositions to happen by February 15th because that's the only thing I really can do.

So I do think the parties should try to get those all scheduled. If you can't, then I'm happy to have a hearing. And I don't think either of you is going to like that hearing because I'm just going to pick dates on a calendar and order depositions to happen on certain dates. And it may not be what either of you want.

But if I'm put in a bind where I have to schedule 16 depositions by mid-February -- and we are almost at the end of January -- that's all I can really do is just say: This depo is on this date, and then order you to do that. So I do think it is to both sides' benefit if you can avoid doing that.

1           So what I would like to do now is setting a briefing  
2           schedule, but I want to make sure I understand the issues  
3           coming at me.

4           Ms. Moskowitz, is it the scheduling of the Apple party  
5           depositions? Is that the issue or are there more issues than  
6           that?

7                   **MS. MOSKOWITZ:** There are a few issues, Your Honor.

8           So I will just briefly summarize so you have a sense of  
9           the universe.

10          It is that Apple hasn't given us dates for several  
11          witnesses; five plus Mr. Cue and Federighi, to the extent that  
12          those are going to happen.

13          We also are in issue over the timing of Mr. Schiller's  
14          deposition, which we do not want to start at the close of fact  
15          discovery. We want it earlier for several reasons.

16          It is the issue that -- which I haven't summarized yet --  
17          but Apple is dumping documents on us on the eve or even after  
18          some of these depositions and unilaterally trying to cancel  
19          them.

20          We have a deposition scheduled for Wednesday,  
21          Mr. Kosmyuka, that Apple let us know over the weekend that they  
22          were -- that they had just produced 65,000 and are producing  
23          another 65,000 documents for him some time this week at some  
24          point.

25          We are insisting that that deposition start on Wednesday.

1 We can't keep pushing things off. We have to start, and we  
2 want Apple to agree or be ordered by the Court to make him  
3 available for his second day -- a longer second day -- at some  
4 point after they have produced the documents and to commit to a  
5 date certain on that.

6 That one is a little bit tough to wait just because his  
7 deposition is starting on Wednesday. Apple hasn't responded to  
8 our notice of deposition to confirm that we will be getting him  
9 for longer than the 10 hours and to start it as scheduled. So  
10 maybe that is something we can just put aside because it is a  
11 little bit pressing.

12 We have the same issue about a deposition starting  
13 tomorrow where they dumped 10,000 -- which, I guess, drop in  
14 the bucket compared to 130,000 -- but still they are producing  
15 documents at the last minute on these depositions. And we  
16 just -- they have to get their act together on these documents.  
17 These are not new custodians. These are old custodians. So  
18 the arguments that Apple's Counsel made don't apply to them.

19 So that's the other deposition-related issue that, again,  
20 we may need to brief or to hear on an expedited basis.

21 There are a couple of other issues, Your Honor, not  
22 directly tied to deposition. Some interrogatory answers that  
23 Apple keeps refusing to give us supplemental answers to, and we  
24 just -- we are running out of time. We need them.

25 We are 21 calendar days away from our expert reports going

1 in and for fact discovery to close. We need, unfortunately,  
2 the Court to compel them to do it because absent us coming to  
3 you, we just don't get them to move. So while I wish I didn't  
4 have to bring disputes like this to Your Honor, we,  
5 unfortunately, do.

6 And we have a similar issue about some document production  
7 issues where they have committed to tell us basic things about  
8 what we were getting and what standards they were applying,  
9 which custodians they were doing; and they haven't done that  
10 either. They committed to and just haven't done.

11 So those are three separate letter briefs that Apple has  
12 and about our -- about document issues, interrogatories and  
13 depositions. There is a little bit more meat on the bones on  
14 that; but I'm cognizant that Your Honor is not looking for a  
15 full presentation on them but just a summary.

16 **THE COURT:** Okay. So there are three letter briefs  
17 that you have sent to Apple; is that right?

18 **MS. MOSKOWITZ:** Correct, Your Honor.

19 **THE COURT:** Mr. Srinivasan, when will Apple be able to  
20 brief its portion of the letter briefs?

21 **MR. SRINIVASAN:** Sure, Your Honor, we think maybe by  
22 Thursday we can comfortably do that. We have a lot going on.  
23 I mean, we are triple -- quadruple tracking, and so we do need  
24 some time.

25 I would just mention briefly that a number of these



1 issues -- particularly on the interrogatories and the document  
2 production -- you know, parties have worked it out -- are  
3 working it out. And we will. I mean, we will or we won't.

4 I mean, if Epic is going to insist on bringing these to  
5 the Court, we will brief them. But I think many of these will  
6 be moot.

7 Just a few things. On Mr. Kosmynka, he is not a new  
8 custodian. He is an Epic custodian for which he has an Epic  
9 production, which is the ones that started anew. That is the  
10 issue for Mr. Kosmynka. The notice for Mr. Kosmynka we  
11 received four days ago, which did not give us enough time to  
12 move to quash.

13 They can't now complain that we have to be compelled to go  
14 forward on that day when they didn't give us enough time to  
15 move to quash with just four days on that subpoena.

16 And so we think that, again, the parties are going to have  
17 to work out these disputes until Your Honor weighs in on them  
18 whenever Your Honor can.

19 **THE COURT:** All right. Let's turn to that.

20 Here is what I'm ordering: I'm ordering the parties to  
21 file these three joint discovery letter briefs by Noon on  
22 January 29th, which is this Friday. And then I'm going to  
23 schedule a hearing for Monday, February 1st at 10:00 a.m. on  
24 those letter briefs.

25 With respect to deposition scheduling issues, I strongly

1 encourage the parties to work out anything you can because I  
2 guarantee you that a solution that the two sides find mutually  
3 satisfactory is likely to be better than one I order especially  
4 since the next hearing is going to be 14 days before all the  
5 depositions have to come to an end in the Epic case.

6 So you have a strong incentive to work this out. That's  
7 what I'm going to do. I'm scheduling a hearing for Monday,  
8 February 1st at 10:00 a.m. And I want the letter briefs in by  
9 Noon on January 29th.

10 Is there anything else that Plaintiffs would like to raise  
11 for today's purposes?

12 **MS. MOSKOWITZ:** Your Honor --

13 **MR. LOPEZ:** Just --

14 **MS. MOSKOWITZ:** Pardon me.

15 **MR. LOPEZ:** Go ahead.

16 **MS. MOSKOWITZ:** To the extent -- just on the two  
17 depositions that are happening tomorrow and Wednesday, is  
18 Your Honor open to providing some guidance to us on that just  
19 given that the briefing schedule obviously is moot -- that  
20 issue will be mooted?

21 **THE COURT:** I don't feel like I have an informed basis  
22 that I can do that. Sorry. I think you should work it out.

23 **MR. LOPEZ:** Your Honor, to that end, Ms. Moskowitz  
24 mentioned the deposition tomorrow and the documents that we  
25 received just last night. I'm not sure exactly what the tone

1 is. I mean, she referred to something around 10,000. I'm not  
2 sure if she means that count as 10,000 documents or pages. It  
3 is certainly a lot of pages, and we are still in the process of  
4 literally putting those into the system; ingesting those and  
5 figuring out exactly what is there. Again, that deposition  
6 begins tomorrow on a 30(b)(1) basis.

7 Also, where the class Plaintiffs are concerned -- where  
8 the Developers are concerned, Apple had told us -- I believe it  
9 was yesterday at 10:47 a.m. -- that they had also designated  
10 the deponent that begins tomorrow as their 30(b)(6) spokesman  
11 as to two of our topics. And coupled with the fact that they  
12 have just produced this large number of documents last night,  
13 there is no way we can do a 30(b)(6) deposition of him as  
14 well -- whether it is tomorrow or continued to the next day.  
15 So I just wanted to put that on the Court's radar.

16 We understand the Court's instruction to try to work those  
17 things out. We will try to do that with Apple, but that may be  
18 something we need to raise with the Court as well depending on  
19 what Apple says when we raise it with them.

20 **THE COURT:** I see. Thank you.

21 **MR. SRINIVASAN:** Your Honor, just lastly -- I don't  
22 want to keep you -- to the extent we have that date, you know,  
23 we do have some other brewing issues that we didn't yet raise  
24 on 30(b)(6) negotiation, third-party depositions and getting an  
25 agreement on that.

1           And if the parties can't reach an agreement on that, I  
2           assume Your Honor would be okay for us to send a letter brief  
3           to the other side and have that briefed as well?

4           **THE COURT:** That's fine. If there are additional  
5           disputes -- whether Apple raises them or the Plaintiffs come up  
6           with additional ones -- anything you want me to hear on Monday,  
7           February 1st, you should have that letter brief filed by Noon  
8           on January 29th. That will be fine to raise additional issues.

9           **MR. SRINIVASAN:** Thank you, Your Honor.

10          **THE COURT:** All right. Thank you, Counsel. And it  
11          looks like I will be seeing you a week from today. I wish you  
12          luck in working things out, and I will see what you are unable  
13          to work out. And we will talk about it then.

14          **MS. MOSKOWITZ:** Thank you, Your Honor.

15          **MR. SRINIVASAN:** Thank you, Your Honor.

16          **MR. LOPEZ:** Thank you, Your Honor.

17                   (Proceedings adjourned at 11:25 a.m.)

18                               ---oOo---

CERTIFICATE OF REPORTER

We certify that the foregoing is a correct transcript  
from the record of proceedings in the above-entitled matter.

DATE: Monday, January 25, 2021

A handwritten signature in blue ink that reads "Marla Knox". The signature is written in a cursive, flowing style. Below the signature is a solid horizontal line.

Marla F. Knox, RPR, CRR  
U.S. Court Reporter